No. 85-2064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES GREER, Warden,
Menard Correctional Center,

Petitioner,

vs.

CHARLES "CHUCK" MILLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I.

THE HARMLESS ERROR DOCTRINE OF *CHAPMAN v. CALIFORNIA* DOES NOT APPLY TO VIOLATIONS OF THE RULE OF *DOYLE v. OHIO* BECAUSE THE RULE STEMS FROM THE DUE PROCESS CLAUSE, AND CLAIMS OF A DENIAL OF DUE PROCESS ARE SUBJECT TO A GENERAL REQUIREMENT THAT ACTUAL PREJUDICE BE SHOWN.

A. The Definition Of Errors Resulting In A Denial Of Due Process Incorporates A General Requirement That The Defendant Show Actual Prejudice, Thus Making *Chapman* Inapplicable As A Standard Of Review In Due Process Cases.

The thrust of respondent's argument is that the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967) applies on review whenever an error to which a constitutional label has been attached occurs; *Doyle v. Ohio*, 426 U.S. 610 (1976) holds that when the prosecutor attempts to impeach a defendant's trial testimony with evidence of his silence after arrest and receipt of the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), the Due Process Clause is violated; therefore, the *Chapman* standard is the proper one to be applied for violations of the rule of *Doyle*. This syllogistic answer to the question now before the Court is wrong because it fails to take into account the constitutional significance of the terms used.

Due process and harmless error are incompatible concepts. If one were to ask a group of jurists what is meant by the phrase "due process of law", they would doubtless answer that it is a guarantee of fundamental fairness. If one were to ask them what it means to say that an error occurred at the trial of a criminal defen-

dant which served to deprive him of due process, their likely answer would be that it means the defendant was denied a fundamentally fair trial. If one were then to ask them what it means to say that an error occurred which served to deprive the defendant of a fundamentally fair trial and that the error was harmless, they would be at a loss to explain logically the conjunction of those two concepts. The conjunction forms a contradiction, and it cannot be rationalized without stripping the words "fundamental fairness" of their meaning.

Thus, the appropriate standard of review when, as here, the error alleged implicates only the Due Process Clause,[1] is the one which comports with the meaning of due process. If the error involves conduct on the part of government officials which is so reprehensible that no civilized society can tolerate it, as in *Rochin v. California*, 342 U.S. 165 (1952), or if it inherently undermines the process of adjudicating guilt or innocence so that the result cannot be

[1] Respondent makes the argument that the typical *Doyle* scenario, in which the post-*Miranda* silence of the defendant is used to impeach his exculpatory trial testimony, implicates the Fifth Amendment as well as the Due Process Clause. He says that although his decision to testify at trial concededly constitutes a waiver of the Fifth Amendment privilege, the voluntariness of that waiver is vitiated by the breach of the implied promise that his prior silence would not be used against him. (Brief for Respondent at 33) There is no authority for this. By its own terms, *Doyle* rests on the Due Process Clause, not the Fifth Amendment, and this Court has often emphasized that *Doyle* is exclusively a due process case. *Wainwright v. Greenfield*, 106 S.Ct. 634, 638-640 and n.n. 7 and 10 (1986); *Fletcher v. Weir*, 455 U.S. 603, 605-606 (1982) (per curiam); *Anderson v. Charles*, 447 U.S. 404, 407 (1980) (per curiam); *Jenkins v. Anderson*, 447 U.S. 231, 239-240 (1980). As these decisions indicate, *Doyle* condemns the unfairness of inducing silence at the time of arrest and then using it at trial to the defendant's disadvantage. It has nothing to do with unfairly inducing the defendant's trial testimony because there is no clear causal link between the implicit assurance contained in the *Miranda* warnings that silence will carry no penalty and the decision to testify at trial.

relied upon as accurate, as in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), then reversal is always required regardless of whether actual prejudice can be shown. In all other cases, actual prejudice must be shown in order to establish fundamental unfairness. *Holbrook v. Flynn*, 106 S.Ct. 1340, 1348 (1986).[2]

While *Chapman* is clearly the appropriate standard of review when the error alleged implicates certain specific provisions of the Bill of Rights, this Court has never squarely held that it also applies to allegations of error which implicate only the Due Process Clause. Respondent contends that this Court has applied *Chapman* to "identifiable violations of the Fourteenth Amendment," and he cites *Rose v. Clark*, 106 S.Ct. 3101 (1986), *Rushen v. Spain*, 464 U.S. 114 (1983) (per curiam), and *Napue v. Illinois*, 360 U.S. 264 (1959). (Brief for Respondent at 30-31) These cases were distinguished in petitioner's brief at 21-23, n.n. 3 and 4.[3]

[2] While petitioner uses the term "actual prejudice", respondent calls it "outcome determinative prejudice." (Brief for Respondent at 25) The definition of actual prejudice proposed by petitioner is the one formulated in *Strickland v. Washington*, 466 U.S. 668 (1984), which borrowed its terminology from two cases in the due process context, *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982) and *United States v. Agurs*, 427 U.S. 97 (1976). In *Strickland*, the Court was careful to point out that the test for prejudice is not an outcome determinative test. *Id.* at 694.

[3] To respondent's list of cases in which *Chapman* was purportedly applied to an alleged violation of due process, *Amici* add *Hopper v. Evans*, 456 U.S. 605 (1982), which they say applies *Chapman* to violations of *Beck v. Alabama*, 447 U.S. 625 (1980). (Brief of *Amicus Curiae* at 14) In *Beck*, the Court struck down a statute precluding the giving of lesser included offense instructions in capital cases, and held that due process requires such instructions be given whenever the evidence would support a verdict of not guilty of the greater offense but guilty of the lesser included offense. In *Evans*, the Court reviewed an alleged violation of *Beck* and found that the evidence did not support the giving of the lesser included offense instruction. 456 U.S. at 613. Evans then argued that the mere existence of the preclusion statute tainted

(Footnote continued on following page)

Finally, respondent argues that while the requirement that actual prejudice be shown is appropriate in cases where ordinarily non-constitutional error is alleged to give rise to a due process violation, as in *Darden v. Wainwright*, 106 S.Ct. 2464 (1986) and *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), or in cases where ineffective assistance of counsel is alleged, as in *Strickland, supra*, it is inappropriate for cases like *Doyle*. Actual prejudice must be shown in order to establish constitutional error, he says, in cases where the error itself is not easily identifiable or when the prosecution is not at fault, but it need not be shown where the error is clear and the prosecution responsible. (Brief for Respondent at 30) *Amici* elaborate somewhat on this theme. They distinguish between errors that are difficult to identify and whose effect cannot be gauged without considering the totality of the circumstances, and "specific 'bright-line' violations such as that involved in *Doyle*. . ." (Brief of *Amicus Curiae* at 17) In the former class of cases, actual prejudice is said to be a necessary component of the constitutional analysis because "the initial 'error' . . . may have so many different ramifications that it cannot be considered *constitutional* error until we trace it through its effects at trial." (Brief of *Amicus Curiae* at 19) (Emphasis in original).

This purported distinction, for constitutional purposes, between "bright-line" errors and those not readily identifiable, or between errors for which the prosecution is responsible and those for which it is not, is more apparent than real. Both respondent and *Amici* rely on language

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[3] *continued*
his trial. The Court answered by stating that "[t]he preclusion clause did not prejudice respondent in any way, and a new trial is not warranted. See *Chapman v. California*, 386 U.S. 18 (1967)." 456 U.S. at 613-614. The nature of this citation hardly reflects a considered determination by this Court that the stringent *Chapman* standard must perforce apply to violations of *Beck*.

in *Strickland*, in which the Court noted that the government is not responsible for the errors of defense attorneys, and that such errors come in an infinite variety and are just as likely to be harmless as they are to be prejudicial. 466 U.S. at 693. These observations, however, did not form the principle basis for the requirement that actual prejudice must be shown. Rather, the decision to adopt the two-part test for ineffective assistance claims stems from the recognition that, like the Due Process Clause, the primary function of the Sixth Amendment's Counsel Clause is to ensure the proper functioning of the adversarial process and the fundamental fairness of the trial. 466 U.S. at 684-685. Thus, the prejudice component was included because "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance of counsel." 466 U.S. at 691-692. The distinction between errors for which the government is responsible and those for which it is not may have reinforced the decision in *Strickland*, but by itself it is not constitutionally significant. Where the right at stake is the one to due process, the focus of the reviewing court is on "the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Even in cases like *Darden*, the virulence and extent of the prosecutor's misconduct did not alter the Court's analysis.

Similarly, the characterization of *Doyle* as creating a "bright-line" rule is not constitutionally significant for purposes of selecting a standard of review. It would have been just as easy to create bright-line rules for any of the instances of misconduct found in *Darden*, because the comments there would never be proper under any circum-

stances. The ease with which errors may be recognized has little to do with the standard under which they are reviewed. It is the nature of the right infringed that determines that choice, and when that right is the one to due process, to a fundamentally fair trial, the defendant must demonstrate actual prejudice in order to show fundamental unfairness.

B. Since *Doyle* Does Not Involve Fifth Amendment Concerns And Does Not Render The Factfinding Process Inherently Unreliable, Respondent Should Be Required To Show Actual Prejudice.

Respondent imputes to petitioner the assertion that this Court's post-*Doyle* decisions effectively overturned *Doyle* (Brief for Respondent at 31); that violations of the rule of *Doyle* are "insignificant infractions" (Brief for Respondent at 32); and that comment on a defendant's post-*Miranda* warnings silence should be allowed. (Brief for Respondent at 33) These allegations are plainly incorrect.

Petitioner does assert that the harmless error doctrine of *Chapman v. California*, 386 U.S. 18 (1967) does not apply in due process cases, and that allegations of error which are said to result in a denial of due process are treated in one of three ways: if the error involves conduct on the part of government officials which is intolerably reprehensible, or if it inherently undermines the reliability of the adjudication of guilt, then reversal is always required; otherwise, the defendant must show actual prejudice. Petitioner has merely noted that *Doyle* is exclusively a due process case, and its constitutional basis lies not in the lack of probative value of evidence of post-*Miranda* warnings silence, but in the unfairness of first inducing that silence and then later using it to the defendant's disadvantage. Therefore, because *Doyle* is a due process case, and since violations of *Doyle* do not inherently undermine

the adjudication of guilt or involve intolerably reprehensible conduct, actual prejudice must be shown in order to warrant reversal of the conviction.

Respondent makes two contentions regarding the constitutional underpinnings of *Doyle* which are untenable. First, citing *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), he says that *Doyle* violations abridge the right to due process in the most basic way, because by impeaching a defendant with his prior silence, the prosecutor may be penalizing him for exercising his constitutional rights. (Brief for Respondent at 32-33) This was no part of the rationale of *Doyle*, and the theory was specifically rejected in *Jenkins v. Anderson*, 447 U.S. 231 (1980), where the Court held that the use of silence in the absence of *Miranda* warnings for impeachment is permissible even if that silence was explicitly based on invocation of the Fifth Amendment privilege. *Id.* at 235-236 and n. 2. *Hayes* is a decision in the line of vindictive prosecution cases, *see Blackledge v. Perry*, 417 U.S. 21 (1974) and *North Carolina v. Pearce*, 395 U.S. 711 (1969), in which this Court prohibited the practice of bringing more serious charges against a defendant in retaliation for exercising his right to a jury trial or his right to appellate review of his conviction. Due Process does not permit the government to retaliate against a person for exercising a protected statutory or constitutional right. *United States v. Goodwin*, 457 U.S. 368, 372 (1982). However, as *Jenkins* makes clear, not every cost associated with the exercise of a constitutional right amounts to an impermissible burden on that right. 447 U.S. at 236-238. The doctrine developed in *Pierce*, *Perry*, *Hayes* and *Goodwin* does not insulate a defendant from all adverse consequences which might follow from the exercise of a protected right. It simply prohibits the government from imposing those costs for purely retaliatory motives. *Goodwin*, 457 U.S. at 376-378. That is not what occurs when

the prosecutor impeaches a defendant with his prior silence, even though that silence is a conscious exercise of the Fifth Amendment. *Jenkins*, 447 U.S. at 238.

A second misconception regarding the constitutional basis for *Doyle* is the assertion made by both respondent and *Amici* that *Doyle* prohibits the use of prior silence because it has no probative value. (Brief for Respondent at 33-34; Brief of *Amicus Curiae* at 23-25) Although that was one of the premises of the decision, later cases make clear that it is not grounded in the Due Process Clause. If it was, then prior silence, whether pre-arrest or post-arrest and regardless of whether *Miranda* warnings were given, would always be inadmissible for impeachment purposes. However, *Jenkins* and *Fletcher v. Weir*, 455 U.S. 603 (1982) (per curiam) permit the use of evidence of prior silence in the absence of *Miranda* warnings. Indeed, *Jenkins* establishes that the subject of the prosecutor's query in this case—respondent's failure to tell the police that he knew Williams and Armstrong committed the murder but that he was not involved—would have been proper if it had focused on the 24-hour period between the time respondent said he learned of the murder and the time of arrest, instead of the post-arrest period.[4]

[4] *Amici* argue that, in addition to having a negative impact on the process of adjudication, *Doyle* violations also undermine the fair administration of justice, and that the government must be bound by the assurances it gives. They cite *Santobello v. New York*, 404 U.S. 257 (1971) (state bound by promise made during plea negotiations not to make sentence recommendation after guilty plea entered) and *Raley v. Ohio*, 360 U.S. 423 (1959) (state may not prosecute for contempt after assuring defendants they could refuse to answer questions on grounds of self-incrimination). In the first place, breaches of promise of the sort involved in these cases always require reversal, and are not subject to harmless error review even under *Chapman*. *Santobello*, 404 U.S. at 262; *Raley*, 360 U.S. at 439-440. Since *Amici* do not urge the same treatment for violations of *Doyle*, the import of their reliance on

(Footnote continued on following page)

Finally, respondent argues the *Chapman* standard should apply on review of violations of the rule of *Doyle* as a matter of policy, because it is the only effective way to discourage prosecutorial misconduct. (Brief for Respondent at 35-37) Discouraging prosecutorial misconduct is not the function of either the harmless error doctrine or the Due Process Clause. *United States v. Hastings*, 461 U.S. 499, 509 (1983) (disciplining prosecutors not the purpose of the harmless error doctrine); *Mabry v. Johnson*, 467 U.S. at 511 ("[t]he Due Process Clause is not a code of ethics for prosecutors"). The selection of a standard of review must be based on the nature of the error alleged and the right infringed. Since *Doyle* is based exclusively on the Due Process Clause, and since violations of *Doyle* do not inherently undermine the process of adjudication, respondent should be required to demonstrate actual prejudice.

II.

THE HARMLESS ERROR RULE OF *CHAPMAN v. CALIFORNIA* SHOULD NOT BE APPLIED IN FEDERAL HABEAS CORPUS PROCEEDINGS, BECAUSE THE INTERESTS WHICH COMPETE WITH THE POLICY OF STRICT ENFORCEMENT OF CONSTITUTIONAL RIGHTS ON COLLATERAL REVIEW OUTWEIGH THE NEED FOR STRICT ENFORCEMENT.

The standard of review applied by this Court on direct appeal where errors of constitutional dimension are involved is that articulated in *Chapman v. California*, 386

[4] *continued*

Santobello and *Raley* is obscure. In the second place, not all governmental assurances are constitutionally binding. *See Moran v. Burbine*, 106 S.Ct. 1135, 1147-1148 (1986) (deliberate deception of suspect's lawyer by police officers concerning their intent not to interrogate in lawyer's absence does not violate due process); *Mabry v. Johnson*, 467 U.S. 504, 509-511 (1984) (state not bound by advantageous plea offer because defendant not induced by offer to plead guilty).

U.S. 18 (1967), and it is "considerably more onerous" than the standard applied to non-constitutional errors. *United States v. Lane*, 106 S.Ct. 725, 730, n. 9 (1986). The reason for this distinction is not that constitutional errors necessarily have a greater impact on the truth-seeking function of the trial, but because constitutional rules serve higher values than do other rules of evidence and procedure. When *Chapman* is applied, values in addition to the need to ensure the fundamental justice of a particular conviction are being served.

By contrast, the central concern of the writ of habeas corpus is narrower in scope. Its purpose is to test the fundamental fairness of an individual judgment by which the State seeks to maintain an individual prisoner in custody. "[F]undamental fairness is the central concern of the writ of habeas corpus", *Strickland v. Washington*, 466 U.S. 668, 697 (1984), and where the focus of the inquiry is on the fundamental fairness of the procedures used, it is appropriate to require the party seeking to overturn the result to demonstrate that he was prejudiced by the error. *See id.* at 691-692 (since the purpose of the right to counsel is "to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding . . . any deficiencies in counsel's performance must be prejudicial" in order to warrant reversal).

Respondent presents three arguments in support of continued application of the *Chapman* standard in habeas corpus cases. First, he says that the costs associated with federal collateral review of state court judgments are minimal, and do not warrant dispensing with a standard of review that serves the full spectrum of constitutional values and not just the need to ensure accurate results fairly arrived at. Second, he says that the harmlessness of constitutional errors is a federal question over which federal review must be maintained in order to ensure that

the state courts are in compliance with constitutional requirements. Third, he says that abandonment of the *Chapman* standard would be contrary to the intent of Congress as expressed in 28 U.S.C. § 2254. For the following reasons, none of these arguments justify the continued application of a standard of review that was designed to comprehensively serve broad interests in a proceeding whose purpose is much narrower.

A. Because Of The Significant Costs It Imposes, Federal Collateral Review Of State Court Convictions Focuses On The Narrow Question Of Fundamental Fairness And Not The Broader Interests Served By The *Chapman* Standard.

Respondent's argument that the costs associated with federal collateral review of state court convictions are insufficient to warrant dispensing with the *Chapman* standard in habeas cases falls on its first premise: that the *Chapman* standard and the writ of habeas corpus share the same concerns. (Brief for Respondent at 40) The cases simply do not support this proposition. It is well-recognized that collateral review of state convictions imposes heavy costs on the criminal justice system—it detracts from finality, frustrates deterrence and rehabilitation, diminishes the significance of the trial as the focal point of the criminal process, and undermines the role of the state courts as the primary line of law enforcement. *Engle v. Isaac*, 456 U.S. 107, 126-128 (1982); *Rose v. Lundy*, 455 U.S. 509, 518-519 (1982); *Sumner v. Mata*, 449 U.S. 539, 550 (1981); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). Accordingly, the Court has emphasized that the principle function of habeas review is to ensure the fundamental fairness of the conviction. *Strickland*, 466 U.S. at 697. At the same time, the Court has recognized that the purpose of harmless error review under *Chapman* is not just to ensure the fundamental fairness of a particular convic-

tion, but to advance respect for the broader societal values reflected in the Constitution as well. *See Rose v. Clark*, 106 S.Ct. 3101, 3111-3112 (1986) (STEVENS, J., concurring in the judgment); *Stanford v. Texas*, 379 U.S. 476, 481-485 (1965). It is because of these additional concerns that *Chapman* establishes a more exacting standard of review for constitutional errors as opposed to non-constitutional errors. However, as *Stone v. Powell*, 428 U.S. 465 (1976) makes clear, those concerns do not play a significant role in habeas review. Despite the important societal values protected by the Fourth Amendment, *see Stanford*, 379 U.S. at 481-482, *Stone* holds that the merits of Fourth Amendment claims, once fairly litigated in state court, may not be reviewed in habeas courts.

Respondent attempts to distinguish *Stone* on the ground that it merely precludes invocation of the exclusionary rule, a judicially created remedy, while he seeks "direct federal habeas protection of his right to a fair trial." (Brief for Respondent at 42) This is not accurate. What respondent seeks to avail himself of in this case is the benefit of a judicially created standard of review, and in this respect he is not unlike the habeas applicant in *Stone*. The *Chapman* standard, like the exclusionary rule, is not mandated by the Constitution, or by the Habeas Corpus Act.

B. Continued Application Of *Chapman* On Collateral Review Is Not Essential To Ensure Compliance With The Constitution By State Courts.

As with his first argument, respondent's second argument falls on its major premise: that unless *Chapman* continues to apply on collateral review, state court harmless error determinations will be insulated from federal scrutiny and the state courts will be free to ignore *Chapman*. (Brief for Respondent at 46-47) There is simply no evidence to document the supposition that state courts do

not enforce federal constitutional guarantees as conscientiously as federal courts do, and considerable evidence to the contrary.

In recent years, there has been a growing trend among state courts to construe their own constitutions as imposing more restrictive standards on police and prosecutors than those required by this Court's decisions construing the federal Constitution. *See, e.g., Federalism And The Rise Of State Courts*, 73 ABA Journal 60, 61-64 (April 1, 1987). Moreover, as the evidence cited by *Amici* confirms—less than 2% of the habeas petitions filed in the 1986 fiscal year ultimately resulted in relief being granted (Brief for *Amicus Curiae* at 37)—state courts are in substantial, indeed nearly perfect, compliance with federal constitutional commands. Respondent's suggestion that this is true only because the threat of habeas forces state courts to comply when they might otherwise be lax (Brief for Respondent at 47) is also undocumented, and eleven years of experience since *Stone* removed Fourth Amendment claims from the ken of habeas does not support the notion.

Amici argue that the standard proposed by petitioner would put a strain on the federal system in general and this Court in particular because the standard proposed does not differentiate between constitutional errors which would be subject to review under *Chapman* on direct appeal, and errors abridging those basic rights for which reversal is always required. (Brief of *Amicus Curiae* at 35-36) This is most emphatically not true. The standard proposed by petitioner would apply only on "collateral review of any constitutional claim *which might be found harmless on direct review. . .*" (Brief for Petitioner at 30) (Emphasis added).

C. The Standard Of Review Proposed By Petitioner Is Not Based On Construction Of 28 U.S.C. § 2254, And Would Not Undermine Congressional Intent.

Both respondent and *Amici* entertain the mistaken belief that the standard of review proposed by petitioner is based on construction of the habeas statute, 28 U.S.C. § 2254, and they argue that the proposal should be rejected because Congress has considered and rebuffed efforts to limit the habeas jurisdiction along these lines. (Brief for Respondent at 48; Brief of *Amicus Curiae* at 26-28) Since § 2254 is not cited in petitioner's brief, it should be clear that the argument is not based on construction of the statute, but rather on setting a standard of review which strikes the appropriate balance between the governmental interests in comity and finality and the habeas applicant's interest in release from a fundamentally unjust incarceration.

Amici make the curious statement that because Congress has enacted a specific statute defining habeas jurisdiction, "[i]t follows that any radical redefinition of the scope of habeas review that would directly diminish the substantive constitutional protections afforded by the law should come from Congress and not from this Court." (Brief of *Amicus Curiae* at 26) The recent history of habeas corpus refutes this. This Court's construction of the jurisdiction conferred by the habeas statute, starting with *Brown v. Allen*, 344 U.S. 443 (1953) and culminating in *Fay v. Noia*, 372 U.S. 391 (1963), teaches that the scope of that jurisdiction is the broadest possible. It extends to all constitutional claims and even encompasses those which have not been exhausted or have been procedurally defaulted. While the Court has never retreated from this interpretation of the scope of the jurisdiction conferred, *see Wainwright v. Sykes*, 433 U.S. at 84; *Francis v. Henderson*, 425 U.S. 536, 538-539 (1976), it has never,

not even in *Fay*, chosen to exercise that jurisdiction to the fullest extent, and every additional limitation imposed since *Fay* has been imposed for equitable reasons, not because Congress amended the statute. Thus, it makes no difference for purposes of the present analysis that Congress has rejected efforts to limit habeas jurisdiction to claims which, if proven, would result in a loss of confidence in the reliability of the result. It is for this Court to decide if that is the appropriate standard, given the costs associated with collateral review and its narrow purpose.

Finally, respondent argues that § 2254 is an expression of Congressional intent to provide a federal forum for the vindication of federal rights, and that since the question of harmless error is a federal one, the habeas court is the proper forum to consider it. (Brief for Respondent at 48) This is the same argument that failed to carry the day in *Stone v. Powell*. It "stem[s] from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights", which lacked empirical support when *Stone* was decided and has gained no currency since. *Id.* at 494, n. 35.

Because the proper focus of federal habeas corpus review is on the justice of the finding of guilt, the appropriate standard of review for errors which might be found harmless on direct appeal is the one which is tailored to the purpose of the proceedings. Accordingly, respondent should be required to demonstrate actual prejudice before habeas relief may be granted.

III.

THE VIOLATION OF THE RULE OF *DOYLE v. OHIO* IN THIS CASE DOES NOT GIVE RISE TO A REASONABLE PROBABILITY THAT, BUT FOR THE ERROR, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT.

In order for respondent to establish that, had the attempted violation of *Doyle v. Ohio*, 426 U.S. 610 (1976) not occurred, there is a reasonable probability that the outcome would have been different, he must demonstrate that there was some compelling reason for the jury to disbelieve Randy Williams. Otherwise, it cannot be said that the *Doyle* violation was the decisive factor. The timing of the error and the ambiguity of the instruction that immediately followed it, while not wholly irrelevant, are of considerably diminished importance when the appropriate standard of review is applied.

Randy Williams confessed his own involvement in the murder, and in so doing implicated respondent and Butch Armstrong as well, within seven hours of his arrest. At that time, he had no reason at all to falsely accuse respondent. Nevertheless, respondent argues that accomplice testimony is inherently unreliable because it is often motivated by malice toward the accused and promises of leniency. However, while he mentions the undisputed fact that Williams testified pursuant to a plea agreement, he does not deny that the agreement was not reached until three months after the initial accusation and could not possibly have provided a motive for it. As for malice toward the accused, respondent argues that he was a threat to Williams' freedom because Williams had earlier confessed his involvement to respondent. (Brief for Respondent at 21) Respondent's lawyer cross-examined Williams for an entire day, but did not explore this possible motive. Moreover, as a speculative theory, it does not wash. Respondent could not have been more of a threat to Williams' freedom than Williams' own confession. Respondent also argues that by implicating him, Williams exculpated his brother Rick. (Brief for Respondent at 21) It is difficult to see how this could be so. No one has ever disputed that Rick Williams was dropped off at his girlfriend's house before anything was done to the victim, so Randy Williams did not need to exculpate his brother. Furthermore, nothing about Randy Williams' accusation of respondent makes it less likely that Rick Williams was involved.

For these reasons, the judgment of the Court of Appeals awarding respondent a writ of habeas corpus should be reversed.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in petitioner's brief, petitioner requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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